PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AT&T Services, Inc. and AT&T Corp.

Complainants,

v.

Proceeding No. 19-222
File No. EB-19-MD-007

123.Net (d/b/a Local Exchange Carriers of Michigan, Inc. and/or Prime Circuits)

Defendant.

AMENDED LEGAL ANALYSIS IN OPPOSITION TO FORMAL COMPLAINT

TABLE OF CONTENTS

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I. INTRODUCTION AND SUMMARY.

AT&T's claims against LEC-MI depend entirely on conduct by, and interactions AT&T had exclusively with, Westphalia. Thus, as it candidly acknowledges, AT&T seeks to hold LEC-MI vicariously liable under an agency theory.[1] That effort fails for three separate reasons. First, despite attempting to preserve claims against LEC-MI, AT&T's settlement with GLC and Westphalia nevertheless extinguishes claims against their alleged "principal." Second, AT&T cannot rely on an apparent-agency theory where it had (at least) constructive knowledge that

[1] Despite that acknowledgment, AT&T incessantly and falsely alleges that "LEC-MI billed" (or, in variations, "LEC-MI had billed," "LEC-MI, as it has conceded, improperly billed," "billed by LEC-MI," "LEC-MI's overcharges," and so forth). *See, e.g.*, Formal Compl. ¶¶ 3, 5, 29, 36, 41, 46, 47, 49, 59, 63, 72, 73, 79, 85, 86, 90. AT&T also states, for example, that it "mistakenly paid LEC-MI" and "overpaid LEC-MI." *Id.* at ¶¶ 39, 41. These inaccurate statements cannot be excused as mere oversight or shorthand. AT&T's claims seek to hold LEC-MI vicariously liable for the acts of Westphalia, and to compel LEC-MI to compensate AT&T for monies paid to Westphalia. AT&T's characterizations, which paint LEC-MI as a primary wrongdoer, are therefore unfairly prejudicial and inappropriate.

Westphalia was submitting fraudulent billings. Finally, the adverse-interest exception to ordinary agency liability precludes AT&T from holding LEC-MI liable for Westphalia's wrongful acts.

Furthermore, even assuming, *arguendo*, that AT&T could prove its agency theory, its claims still fail because it cannot prove the damages it alleges to the necessary degree of certainty. And, in all events, because AT&T's actual or constructive knowledge establishes that its cause of action accrued with the receipt of each invoice at issue, AT&T's claims can only reach back two years from the date it filed its Informal Complaint, such that its request for damages from earlier periods is foreclosed by 47 U.S.C. § 415.

II. AT&T'S RELEASE BARS THE PRESENT CLAIMS.

The Commission need not reach the merits of the agency questions posed by AT&T because its claims fail for a threshold reason: release. AT&T's own exhibit compilation attaches its Settlement Agreement with AT&T, GLC and Westphalia. Formal Complaint at Ex. 6. In its Formal Complaint, AT&T asserts that the settlement "did not resolve, or provide AT&T with any compensation concerning, the disputed end office charges billed by LEC-MI." Formal Compl. ¶ 4, n.5. Thus, AT&T believes itself entitled to bring the claims it asserts here. Presumably, AT&T's position is based on the following language:

> nothing herein releases . . . (c) any claims by AT&T against parties other than the Debtor Releasee Parties, including, without limitation, 123.Net, Inc. d/b/a Local Exchange Carriers of Michigan, notwithstanding GLC, WTC, WBI or any other party billing AT&T on behalf of or as agent for such parties . . .

Formal Compl. Ex. 6, ¶ 7, Settlement Agreement (ATT-0000081 to ATT-0000082).

But that attempted carve-out is ineffective under Michigan law. "At common law, a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory

of vicarious liability, even though the release specifically reserves claims against the principal."[2] *Theophelis v. Lansing Gen. Hosp.*, 424 N.W.2d 478, 481 (Mich. 1988). *Theophelis* did not invent that rule; rather it reaffirmed in the wake of a new contribution statute "the deeply rooted common-law doctrine that release of an agent discharges the principal from vicarious liability." *Id.* at 482; *see also id.* at 481-83 (collecting authorities).

After *Theophelis*, a challenge was raised that it was non-binding precedent because it spawned a concurring opinion.[3] The Michigan Court of Appeals squarely rejected that challenge, observing that "[b]ecause four justices concurred that [the contribution statute] does not abrogate the common-law rule in question, *Theophelis* is binding with regard to that point of law." *Felsner v. McDonald Rent-A-Car, Inc.*, 484 N.W.2d 408, 410 (Mich. Ct. App. 1992) (dismissing claims against principal based on release of agent). Moreover, as noted, *Theophelis* merely reaffirmed longstanding Michigan law, which no other Michigan Supreme Court decision has abrogated:

> [W]hen the cause of action is destroyed as to one tortfeasor, it falls as to the others, even though it is attempted to preserve the liability of the others. So, where one tortfeasor is released from liability on payment of part of the damage, the others are discharged although the contract expressly reserves right of action against them.

Theophelis, 424 N.W.2d at 482-483.

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[2] As AT&T itself admits, Formal Compl. ¶¶ 94, 95, 99, the alleged violations of the Communications Act in this case sound in tort and are therefore governed by this release and *Theophelis*. *See, e.g., Qwest Commc'ns. Co. v. Aventure Commc'ns Tech., LLC*, 86 F. Supp. 3d 933, 1017-18 (S.D. Iowa 2015) (finding a LEC's alleged violations of the Communications Act, including for fraudulent billing practices, sounded in tort); *see also* Brief for Respondents at 69-70, Comcast Corp. v. F.CC, 600 F.3d 642 (D.C. Cir. Sept. 21, 2009) (No. 08-1291), 2009 FCC LEXIS 4986, at *79 (likening "the 'unjust and unreasonable' standard of section 201(b), which has been the touchstone of common carrier regulation for decades, [with] the 'reasonable person' standard of traditional tort law.").

[3] The concurring justice merely was not convinced that the trial court had definitively found that the document at issue was a release, and would have remanded for a clearer finding of fact. *Id.* at 487.

Nor does this rule depend on the distinction between employee-agents and independent-contractor-agents. *Felsner* involved an employee and referred to respondeat superior, which is not at issue here. *See Felsner*, 484 N.W.2d at 410. But *Theophelis* was a classic apparent-agent case against a hospital based on conduct of a nurse anesthetist and anesthesiologist "who, although not employees of the hospital, were alleged to be ostensible agents of the hospital." *Theophelis*, 424 N.W.2d at 480.

Here, AT&T granted Westphalia (and GLC) a broad, general release "from any and all manner of claims . . . that the AT&T Releasor Parties might have . . ." Formal Compl. Ex. 6, ¶ 7, Settlement Agreement (ATT-0000081 to ATT-0000082). Indeed, the Recitals to the Settlement Agreement were expressly incorporated as substantive agreements, *Id.* at ¶ 1, and further express the parties' "desire to resolve and settle all disputes between and among them." *Id.* at 3 (last "WHEREAS" clause). In effectuation of that settlement, the Bankruptcy Court first issued an Order Approving Terms of Compromise Among Debtors, Everstream GLC Holding Company, LLC, and AT&T Corp.[4] It then entered an Order confirming the Debtor's Chapter 11 Plan, to which AT&T consented by voting to accept.[5] A bankruptcy court's confirmation of a chapter 11 plan has the effect of a judgment for res judicata purposes. *Browning v. Levy*, 283 F.3d 761, 772

[4] *See* LEC-MI Ex. 1, Order Approving Terms of Compromise (LEC-MI_00001 to LEC-MI_00004).

[5] *See* LEC-MI Ex. 2, Order Confirming Chapter 11 Plan (LEC-MI_00005 to LEC-MI_00032); *see also* LEC-MI Ex. 3, Tabulation of Votes on Joint Chapter 11 Plan, Ex. B at 1, Ex. D at Ballot #27 (LEC-MI_00041, LEC-MI_00072). Indeed, even in the absence of the express release in the Settlement Agreement, AT&T would still have given a release sufficient to extinguish its vicarious claims against LEC-MI here. A bankruptcy court's confirmation of a chapter 11 plan has the effect of a judgment for res judicata purposes. *Browning v. Levy*, 283 F.3d 761, 772 (6th Cir. 2002). And, by voting in favor of the plan, AT&T undeniably consented to that judgment. Because entry of a consent judgment itself constitutes a release, *Felsner*, 484 N.W.2d at 570, and the Bankruptcy Court's plan confirmation order here does not (and could not) reserve claims against LEC-MI as Westphalia's putative principal, the order serves as an independent and sufficient basis to bar AT&T's claims here.

(6th Cir. 2002). So, not only does the release in the Settlement Agreement extinguish any possible claims by AT&T against Westphalia (or GLC) as LEC-MI's putative agent, but so does the judgment of the bankruptcy court. *Cf. Felsner*, 484 N.W.2d. at 411 (entry of consent judgment constitutes a release).[6]

AT&T admits that its claims against LEC-MI are based on "vicarious liability" deriving from Westphalia's actions as an alleged apparent agent. Formal Compl. ¶ 94. AT&T also admits—and its exhibits establish—that it released all claims it might have had against Westphalia. But, as demonstrated by these authorities, AT&T's attempt to carve out from its

[6] For completeness, LEC-MI notes that a covenant not to sue an agent, unlike a release, does not discharge a principal under Michigan law. *Theophelis*, 424 N.W.2d at 486. That is of no moment here, however, because AT&T's settlement expressly provides for "release and forever discharge," and because the plan confirmation to which it assented further operates as a release. Formal Compl. Ex. 6, ¶ 7, Settlement Agreement (ATT-0000081 to ATT-0000082). AT&T's claims against GLC and Westphalia encompassed, or could have encompassed, all of the overcharges that AT&T now seeks from LEC-MI. *See, e.g., id.* at 1-2 (reciting that "AT&T assert[s] that disputed charges for interstate telephone traffic imposed by GLC and [Westphalia] were unlawful" and "GLC and [Westphalia] owe AT&T approximately $13.6 million in overcharges/refunds for interstate telephone traffic"); Formal Compl. Ex. 14, ¶¶ 61-75, AT&T and GLC Joint Statement (ATT-0000175 to ATT-0000178) (reciting, *inter alia*, the disputed LEC-MI end office charges as part of AT&T's Formal Complaint proceeding against GLC and Westphalia). AT&T's claims for those end office charges have been extinguished by the Bankruptcy Court's confirmation of the Chapter 11 plan that AT&T voted to accept. It cannot seek to circumvent that consented-to judgment now. *See* Restatement (Second) of Judgments § 24 ("When a valid final judgment rendered in an action extinguishes plaintiff's claim . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose."); s*ee also Hubbard v. Nationwide Lending Corp.*, Case No. 17-cv-13232, 2018 U.S. Dist. LEXIS 114105, at *11 (E.D. Mich. July 10, 2018) (ruling plaintiff's claims were barred by res judicata because arguments as to separate defendant should have been raised in the original action (citing Restatement (Second) of Judgments §§ 24-25)); *Nat'l Benevolent Ass'n of the Christian Church (Disciples of Christ) v. Weil, Gotshal & Manges, L.L.P.*, No. SA-07-CV-00379-WRF, 2008 U.S. Dist. LEXIS 49084, at *29 (W.D. Tex. June 2, 2008) (stating a plaintiff's claims are barred by res judicata if the claim existed at the time of the original proceeding and it could or should have brought its claims in that proceeding (citing *Browning v. Levy*, 283 F.3d 761, 761 (6th Cir. 2002))).

release of Westphalia vicarious claims against LEC-MI is invalid under Michigan law. Therefore, the claims must be dismissed.

III. AT&T HAD REASON TO KNOW WESTPHALIA WAS ASSESSING IMPROPER CHARGES, AND THEREFORE COULD NOT HAVE REASONABLY BELIEVED WESTPHALIA WAS ACTING UNDER AUTHORITY FROM LEC-MI.

AT&T correctly recognizes that Westphalia lacked actual authority from LEC-MI to issue fraudulent bills and pocket for itself any sums thereby obtained. So AT&T roots its claims in what it contends was Westphalia's apparent authority to bill for LEC-MI. Its theory is simple: It alleges that LEC-MI had used Westphalia as its billing agent for access charges and never complained about AT&T paying Westphalia, thus Westphalia had "apparent authority to bill the end office charges in dispute."[7] Formal Compl. ¶ 94.

What AT&T omits, however, is any consideration of its own role in the apparent-authority triangle. For, as case law makes clear, apparent authority cannot exist where the third party knows or should know that the acts at issue are unauthorized:

> [First] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person relying on the agent's apparent authority must not be guilty of negligence.

Little v. Howard Johnson Co., 455 N.W.2d 390, 396 (Mich. Ct. App. 1990) (internal citations omitted).

[7] AT&T also mentions LEC-MI's reference, in response to AT&T's Informal Complaint, to a billing arrangement with GLC. Formal Compl. ¶ 94. But this post hoc reference in 2014 cannot support a claim based on apparent authority, given that was not a contemporaneous manifestation on which AT&T could have relied in 2012 and 2013 to form a belief as to the scope of Westphalia's authority. *See* Restatement (Third) of Agency § 2.03 (belief must be "*traceable* to the principal's manifestations") (emphasis added); *Bruton v. Automatic Welding & Supply Corp.*, 513 P.2d 1122, 1126 (Alaska 1973) ("After the fact manifestations . . . are not evidence that a purported agent has apparent authority.") Therefore, as pled, AT&T's claims are dependent solely on its interpretation of LEC-MI's silence.

Moreover, that a person has been an agent in the past, for prior transactions, does not vindicate an assumption that he has carte blanche authority for future transactions. *See Meretta v. Peach*, 491 N.W.2d 278, 280 (Mich. Ct. App. 1992) ("In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances."); *see also WMCV Phase 3, LLC v. Shushok & McCoy, Inc.*, 750 F. Supp. 2d 1180, 1190 (D. Nev. 2010) (undisputed agency in the past did not resolve question of fact regarding apparent authority). This is because the third party's belief in the alleged apparent authority still must be ***objectively reasonable*** under the circumstances. *Meretta*, 491 N.W.2d at 280; *see also Atl. Die Casting Co. v. Whiting Tubular Prods., Inc.*, 60 N.W.2d 174, 178 (Mich. 1953) (test is whether a "third person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming the agent is authorized to perform a particular act"); *WMCV*, 750 F. Supp. 2d at 1190 ("the party who claims reliance must not have closed his eyes to warning or inconsistent circumstances") (quoting *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 934 P.2d. 257, 261 (Nev.1997)).

AT&T mentions, but does not address, the reasonableness requirement. Or perhaps it just presumes that, in light of LEC-MI's prior lack of complaint to Westphalia billing for access charges, it was justified in assuming Westphalia had authority for any and all charges it presented. Either way, AT&T conspicuously ignores the elephant in the room, that otherwise features prominently throughout the Formal Complaint: the fact that, according to AT&T's own calculations, LEC-MI's supposed ***end-office*** charges skyrocketed virtually overnight from 1,874,862 average minutes of use to more than 20 million MOUs per month. Indeed, according to AT&T's own exhibit, Westphalia's scheme began "in earnest" in February 2012. Formal Compl. ¶¶ 54-55. By May 2012, the billings had increased nearly 1100% over AT&T's baseline

from just a few months earlier. Formal Compl. Ex. 1, Joint Declaration of Lancaster & Giedinghagen, Ex. A (ATT-0000019); *see also* Starkey Decl. ¶ 50 (LEC-MI_00122) ("It is simply not credible for AT&T to claim that it was unaware of these obvious trends until mid-2013, but if AT&T's claim is true, then it indicates that AT&T was willfully ignorant on the topic and chose not to investigate an issue that AT&T had been actively monitoring and disputing for over a decade."). Such a circumstance is precisely what courts consider in finding that a third party's belief in apparent authority was unreasonable or even negligent.

For example, in *Permobil, Inc. v. American Express Travel Related Services Co.*, an accounts-payable supervisor for a company obtained a former employee's American Express card. 571 F. Supp. 2d. 825, 829 (M.D. Tenn. 2008). Over the course of three-and-a-half years, she and her husband made nearly $1.3 million in unauthorized charges. *Id.* The employee paid those charges with company funds and then destroyed the monthly statements. *Id.*

After discovering the fraud, Permobil sued American Express seeking restitution. *Id.* In response, American Express contended that Permobil's failure to separate the approval and payment accounting functions, and the fact that it paid the charges after receiving statements detailing them, cloaked the employee in apparent authority as a matter of law and precluded recovery. *Id.* at 833. The court disagreed. "'If . . . the third person has reason to believe that the agent is acting for his own benefit, he cannot subject the principal to liability upon a contract which in fact is unauthorized . . . . Where circumstances indicate that the agent may be acting in fraud of the principal, a person dealing with the agent is required to exercise care in investigation in order to hold the principal liable.'" *Id.* at 834 (quoting Restatement (Second) of Agency § 166 cmts. b and c).

The court noted several factors that "plausibly indicated that [the employee] may have been acting in fraud of Permobil, requiring American Express to act reasonably in investigating the situation." *Id.* These included that many charges were distinctly personal in nature and that the signatures on the charges did not match the signature on file for the card. *Id.* The court also emphasized American Express's ability to monitor the account for uncharacteristic or unusual charges. *Id.* Accordingly, the court denied American Express's motion to dismiss based on its apparent-authority argument. *Id.* at 836.

Likewise, in *General Overseas Films, Ltd. v. Robin International, Inc.*, a lender sought to hold a company liable on an apparent-agency theory for a personal loan guarantee made by the company's vice president and treasurer. 542 F. Supp. 684, 686 (S.D.N.Y. 1982). Despite that a treasurer would often, by virtue of his position, have apparent authority to bind his company in routine transactions, the court nevertheless noted that this was "not the sort of arrangement in which the guarantor company's treasurer or other financial officer normally should be expected to engage" and "should have alerted [the lender] to the danger of fraud." *Id.* at 690, 692.

Other cases provide further illustration. The Ninth Circuit recently affirmed a finding that reliance on a bank manager's apparent authority was unreasonable where "[n]umerous indicia of fraud were or should have been evident" on the face of a purported letter of credit. *Compass Bank v. Morris Cerullo World Evangelism*, 696 F. App'x 184, 185-86 (9th Cir. 2017). Another district court emphasized that apparent authority "vanished when, with passing time, the plaintiffs were put on notice that the accounts and transactions were being mishandled"—there, by atypical absence of depository records that become increasingly apparent when compared to other, legitimate transactions. *Tranchina v. Howard, Weil, Labouisse, Friedrichs, Inc.*, CIVIL ACTION NO. 95-2886 SECTION "C", 1997 WL 472664, at *2, *6 (E.D. La. Aug. 18, 1997).

Even the Restatement (Third) of Agency, upon which AT&T relies heavily in its Formal Complaint, emphasizes the point:

> Some transactions by their nature should strike a dissonant chord for a reasonable third party, given the situation in which an agent has been placed, the nature of the principal or its activities, or what the third party knows of the agent's position within an organization. A basic circumstance is whether the transaction is itself legal. . . . [A] transaction may be "novel" even if it bears some relationship to the principal's interests if the type of transaction is unprecedented in light of the principal's position, business, or activity.

Restatement (Third) of Agency § 2.03 cmt. d.

Taken together, these authorities demonstrate that it is not enough for AT&T to say that Westphalia had been a billing agent for LEC-MI in previous transactions, or that LEC-MI did not object to AT&T paying Westphalia. Nor are the various illustrations on which it relies sufficient. Rather, the critical question is whether it was reasonable, in light of AT&T's preeminent sophistication and expertise in this industry, for AT&T to believe that LEC-MI's legitimate end-user minutes-of-use suddenly skyrocketed from 2 million minutes per month to more than 20 million minutes per month.

As the accompanying Declaration of Michael Starkey amply illustrates, both before and throughout the entire time period in question, AT&T, was actively reviewing, auditing, re-rating, and challenging Westphalia's invoices, including various charges that Westphalia had ascribed to LEC-MI's OCN, and 8YY charges generally. Starkey Decl. ¶¶ 8, 32-50 (LEC-MI_00096, LEC-MI_00110 to LEC-MI_00122). AT&T's active oversight and scrutiny was entirely consistent with AT&T's aggressive action on 8YY aggregation traffic writ large. *Id*. ¶¶ 16-27 (LEC-MI_00100 to LEC-MI_00108). Given the extensive resources of AT&T and its active monitoring of LEC access bills generally and Westphalia's charges specifically, AT&T knew or should have known that there was something seriously wrong with the bills Westphalia was submitting. That knowledge, in turn, should have caused AT&T to investigate Westphalia's

authority to bill those charges, and renders unreasonable any reliance on LEC-MI's mere silence as manifesting authority to bill them. Therefore, AT&T simply cannot now claim that it relied on Westphalia's authority to bill these rapidly escalating 8YY aggregation-related charges under LEC-MI's OCN. And as Mr. Starkey illustrates, even if AT&T somehow *ever* relied on Westphalia's authority to bill under LEC-MI's OCN, which the evidence does not support, under *Tranchina* any such reliance was unreasonable by May 2010.[8] Thus, having actively and consistently rejected Westphalia's authority to bill LEC-MI's charges throughout the entire period at issue, AT&T's agency argument fails for this reason too.

IV. THE ADVERSE-INTEREST EXCEPTION WOULD BAR AT&T'S CLAIMS EVEN IF AT&T HAD LACKED REASONS TO DOUBT WESTPHALIA'S AUTHORITY.

AT&T's claims also run afoul of the adverse-interest exception to normal agency principles. Under that exception, an agent's "actions will not be deemed to have been done for the benefit of the corporation if the actions were adverse to the corporation's interests. That is, the acts were done for the actor's own benefit." *MCA Fin. Corp. v. Thornton*, 687 N.W.2d 850, 857 (2004); *see also In re ChinaCast Educ. Corp. Sec. Lit.*, 809 F.3d 471, 476 (9th Cir. 2015) ("Under that exception, a rogue agent's actions or knowledge are 'not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person.'") (quoting Restatement (Third) of Agency § 5.04).

AT&T insists that the adverse-interest exception is unavailing against a third party, and thus provides LEC-MI no benefit here. But the exception is not so starkly drawn. Rather, just as

[8] In light of this, and the limitations defect discussed below, even if the Commission were to conclude that AT&T had reasonably relied on apparent authority for Westphalia to bill these charges, AT&T still would be limited to damages for only a single month—April 2012—and even then only if it could adequately separate VoIP traffic from wireless traffic.

with apparent authority, the focus is on determining who should bear the burden of a loss caused by a separate wrongdoer; and that determination does not always break in a single direction. Therefore, the exception may not apply—and imputation may be made—"when necessary to protect the rights of a third party who dealt with the principal in good faith." Restatement (Third) of Agency § 5.04(a). Yet:

> A third party who knows ***or has reason to know*** that an agent acts adversely to the principal, and who deals with the principal through the agent, has not dealt in good faith and may not rely on the exception stated in subsection (a) to the adverse-interest exception.

Id. at cmt. b. (emphasis added).

As fully detailed above, AT&T knew or had reason to know that Westphalia was acting illegally. So it did not deal in "good faith" and its conduct does not warrant invoking the exception-to-the-exception. Moreover, AT&T's knowledge in this regard was far superior to LEC-MI's: AT&T had access to the actual billing information from Westphalia. *See* Starkey Decl. ¶¶ 28-33 (LEC-MI_00108 to LEC-MI_00111) ("[T]he invoices AT&T received from Westphalia for the traffic at issue in this case allowed AT&T to identify the unique end office, and other, charges, attributable to LEC-MI . . ."). Conversely, Westphalia provided LEC-MI no information about what it was billing AT&T, and did not even respond to LEC-MI's request for billing information. *See, e.g.,* AT&T Formal Compl. Ex. 5, LEC-MI's Informal Complaint Response, 4 (ATT-0000071) (describing lack of information received from GLC and Westphalia).

Indeed, this is not an ordinary principal-agent situation in any sense. Allocation of fault (or imputation) to the principal typically follows the premise that the principal has selected the agent and, as a matter of self-interest, is incentivized to monitor his fidelity. *See Kirschner v. KPMG LLP*, 938 N.E. 2d 941, 951-52 (N.Y. 2010) ("[I]mputation fosters an incentive for a

principal to select honest agents and delegate duties with care."). Here, however, LEC-MI—a small CLEC—simply subtended GLC's tandem and, as a logical extension, concurred in GLC's tariff. It was in no way situated to monitor the billing that GLC delegated to Westphalia. AT&T, on the other hand, was ideally situated to do so. AT&T not only had the billing data itself, but also the BRAVO software, the AT&T Access Management group, including a team of analysts from a global consulting firm, and the expertise from dealing with thousands of CLECs since the inception of the access-charge regime many decades ago. Starkey Decl. ¶¶ 40-42 (LEC-MI_00115 to LEC-MI_00116).

Thus, not only are the factual predicates met for applying the adverse-interest exception, but so too are the policy reasons for doing so. AT&T was in the superior position to detect the fraud here and to withhold payment. Indeed, this is exactly what AT&T admittedly did in July 2013. LEC-MI, in contrast, had none of the necessary information and received none of the ill-gotten proceeds.

It is unfortunate that either party should have to bear the burden of the real wrongdoer here, Westphalia. But, because that is the case, the loss should fall on AT&T as the party best situated to have prevented it.

V. AT&T CANNOT PROVE ITS DAMAGES TO THE REQUIRED DEGREE OF CERTAINTY.

AT&T admits that the traffic in question is a mix of wireless and VoIP traffic. Formal Compl. ¶¶ 26-27, 50, 87. As the party claiming damages, AT&T must prove the damages it alleges with a reasonable degree of certainty. *See, e.g., Berrios v. Miles, Inc.*, 574 N.W.2d 677, 680 (Mich. Ct. App. 1997). But AT&T's analysis simply assumes away the fact that the FCC's only pronouncement on the question of whether LECs can assess end office charges for VoIP-originated traffic is that they *can* collect those charges from long distance carriers like AT&T.

While that issue has been remanded to the Commission following an appeal to the D.C. Circuit, that issue remains pending before the Commission. *See generally* FCC Docket Nos. WC 10-90 and CC 01-92; *see also AT&T Corp. v. FCC*, 841 F.3d 1047, 1049 (D.C. Cir. 2016) (remanding the FCC's *Declaratory Ruling* that VoIP traffic switching is the "functional equivalent" of end-office switching back to the Commission (citing *In re. Connect America Fund*, 30 FCC Rcd. 1587, 1588-89 (2015)). Therefore, AT&T wrongly assumes that those charges were improper, as the only FCC opinion on this matter reflects that those Westphalia charges were in fact proper for VoIP traffic. *See Connect America Fund*, 30 FCC Rcd. at 1588-89. Having undertaken no effort to differentiate between wireless and VoIP-originated traffic in its calculation of damages, AT&T's claimed damages therefore cannot be proven to a reasonable degree of certainty, and its damage claims should be dismissed accordingly.

VI. AT&T'S CLAIMS FOR DAMAGES ARE BARRED IN PART BY THE APPLICABLE STATUTE OF LIMITATIONS.

Even if AT&T could prove its alleged damages with a reasonable degree of certainty, it is seeking damages outside of the two-year statute of limitations prescribed in 47 U.S.C. § 415. Causes of action for overbilling arise each month a bill contains disputed charges. *See In re Qwest Commc'ns Co. v. Budget Prepay, Inc. d/b/a Budget Phone, and Budget Phone, Inc.*, 28 FCC Rcd. 5170, 5173 (2013). AT&T had two years in which to assert any claim for overbilling. 47 U.S.C. § 415(c). AT&T knew, or at the very least should have known, about its alleged overcharge claim by May 2010 at the latest. Starkey Decl. ¶¶ 8, 47, 49 (LEC-MI_00096, LEC-MI_00119 to LEC-MI_00121) ("It is clear . . . AT&T could have (and should have) fully understood and explored the possibility that 8YY aggregation related charges were accruing on its invoices from Westphalia no later than May of 2010."). Thus, AT&T's claims that relate to bills Westphalia issued two years or more before April 2014, when AT&T filed its informal

complaint, are barred by operation of Section 415. Therefore, AT&T cannot claim damages (or interest) for the months of February and March of 2012 as a matter of law. See Formal Compl. Ex. 1, Joint Declaration, Ex. A (ATT-0000013).

VII. CONCLUSION.

For the reasons set forth above, AT&T's complaint should be dismissed. AT&T's claims are barred by the doctrines of release and res judicata. Its claim for vicarious liability is without merit. And, in all events, it has failed to prove its damages with reasonable certainty, and it improperly seeks damages outside of the statute of limitations.

Respectfully submitted,

DATED: October 3, 2019

123.NET d/b/a LOCAL EXCHANGE CARRIERS OF MICHIGAN, INC.

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